Supreme Court, U. S.
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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

NO. 79-1762

TOWER LOAN OF MISSISSIPPI, INC.
Petitioner

vs.

BESSIE LEE HARRIS
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT
OF THE UNITED STATES

_____ TERM, 1980

NUMBER_____

TOWER LOAN OF MISSISSIPPI, INC.
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vs.

BESSIE LEE HARRIS
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

Tower Loan of Mississippi, Inc. petitions this Court for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on January 2, 1980, modifying and remanding the judgment of the United States Court for the Southern District of Mississippi, entered September 20, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is officially reported at 609 F.2d 120 (5th Cir. 1980). The district court entered findings of fact and conclusions of law along with a final judgment which were entered on

September 20, 1977. These items are not officially recorded. The opinion of the Court of Appeals and the findings of fact and conclusion of law and final judgment of the district court are reprinted in the appendix commencing on pages 28 and 32, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered January 2, 1980. On February 20, 1980, the Court of Appeals entered an order denying the petition for rehearing of Tower Loan of Mississippi, Inc. The court also entered an order denying the petition for rehearing en banc of Tower Loan of Mississippi, Inc. on February 20, 1980. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1) (1976).

QUESTIONS PRESENTED

I

Should rescission of a loan transaction pursuant to 15 U.S.C. §1635(b) (1976) of the Truth in Lending Act be conditioned upon repayment of the principal amount of the loan plus interest by the debtor?

II

Is a corporation funded under the Legal Services Corporation Act, 42 U.S.C. §2996 (1976), entitled to an award of attorney's fees when representing a qualified recipient of services in a truth-in-lending action for which statutory attorney's fees are provided?

In the event this petition is granted, the petitioner reserves the right to argue that the district court's application of 15 U.S.C. §1635 (the rescission statute) constituted a denial of due process to the petitioner. The petitioner further reserves the right to argue that if a Legal Services Corporation is entitled to an award of attorney's fees in truth-in-lending cases, then the determination of a reasonable attorney's fee should be based upon state law.

STATUTES AND REGULATIONS INVOLVED

U.S. Constitution, Amendment V; 15 U.S.C. §1635 (1976); 15 U.S.C. §1640(a) (1976); 42 U.S.C. §2996 (1976); 12 C.F.R. §226.9.

The pertinent provisions of these statutes and regulations are set forth in Appendix "B", infra, pages 34 through 38.

STATEMENT OF THE CASE

On April 23, 1976, Bessie Lee Harris borrowed $2,125.00 from Tower Loan of Mississippi, Inc., d/b/a Russell Baker Finance of Vicksburg. At the time of entering into the transaction, Harris received a Notice of Right of Rescission, required by federal law, which informed her that she had until midnight of April 27, 1976, to rescind the transaction. She began to make the monthly payments required by the installment promissory note which had been signed by her, until she began experiencing financial difficul-

ties, at which time she contacted Central Mississippi Legal Services. Barry H. Powell, Esq., on April 22, 1977, wrote Tower, informing Tower that Harris rescinded her loan of April 23, 1976. Tower responded that Harris had received notice of opportunity to rescind in accordance with the Act and Regulation Z and that Harris had no right of rescission. Tower further supplied Mr. Powell with the net pay-off of the loan, and offered to cancel Tower's security interest and deed of trust on receipt of the net pay-off. On April 22, 1977 suit was filed against Tower by Harris. The original complaint was subsequently amended on May 13, 1977. Jurisdiction in each complaint was based on 15 U.S.C. §1640(e) and 28 U.S.C. §1337. In the amended complaint, Harris claimed in Count I that Tower had committed truth-in-lending violations, and in Count II that Tower had been given a timely notice of rescission and that Harris was entitled to rescind the transaction and have the deed of trust on her residence cancelled. Tower answered denying that any truth-in-lending violations existed in the disclosure statement of April 23, 1976 and denying that Harris was entitled to statutory penalties or rescission. Tower affirmatively alleged that the Truth in Lending Act and Regulation Z were unconstitutional under the due process clause of the Fifth Amendment, that Harris was being represented by salaried employees of Central Mississippi Legal Services whose attorneys could not recover any attorney's fees, that Tower had acted in good faith in conformity with rules, regulations and interpretations of the Federal Reserve Board and that any alleged violations were unintentional and

resulted from bona fide error. After interrogatories were propounded to Tower and answered by Tower, and after the deposition of Bessie Lee Harris by Tower, Harris filed a motion for summary judgment requesting statutory damages, judgment for payments made by Harris to Tower, cancellation of the note executed by Harris, cancellation of the deed of trust executed by Harris and reasonable attorney's fees. Affidavits and exhibits were attached to Harris' motion.

On September 20, 1977, the district court entered an opinion as follows:

> "1. Plaintiff, Bessie Lee Harris, be and hereby is awarded a judgment against the defendant, Tower Loan of Mississippi, Inc., a Mississippi corporation, in the amount of $1000 statutory Truth-in-Lending penalty, $1182 for sums heretofore paid defendant, and $300 as a reasonable attorney's fee, for a total of $2482.00
>
> "2. The note executed by Bessie Lee Harris to Tower Loan of Mississippi, Inc., d/b/a Russell Baker Finance of Vicksburg, loan number 2379 dated 4/23/76, with a total of payments of $2125, is hereby cancelled.
>
> "3. The deed of trust executed by Bessie Lee Johnson Harris in favor of Tower Loan of Mississippi, Inc., beneficiary, Jack R. Lee, trustee, dated April 23,

1976, and recorded in book 545 at page 313 in the office of the Chancery Clerk of Warren County, Mississippi, is hereby declared null and void and hereby cancelled, and defendant is hereby ordered to cancel said deed of trust on the records of said Chancery Clerk.

"4. Costs of this cause are assessed to the defendant."

The petitioner appealed the judgment to the Court of Appeals for the Fifth Circuit. On January 2, 1980, the Court of Appeals rendered an opinion and entered a judgment modifying an remanding the decision of the district court in this case. The court concluded that a violation of the Consumer Credit Protection Act (Truth in Lending Act) had occurred, and that the district court had properly cancelled the deed of trust and awarded the $1,000 statutory penalty. The court modified the district court's ruling, by ordering that the amount owed by the petitioner to the respondent should be reduced by the amount that the respondent owed to the petitioner under 15 U.S.C. §1635(b)(1976). The court further modified the district court's opinion by ordering that the $300 attorney's fees be paid directly to Legal Services. The Court of Appeals remanded the decision to determine which deductions from the total of payments constituted money paid for the benefit of Harris and which were charges by Tower.

REASONS FOR GRANTING THE WRIT

I

This case merits review by this Court on certiorari because the decision of the Court of Appeals for the Fifth Circuit is in conflict with the decision of the Court of Appeals regarding rescission and in conflict the decision of the Court of Appeals of the Fourth, Ninth and Tenth Circuits. These courts have mandated that where rescission is ordered, the transaction should be handled in a manner that is similar to a loan transaction; that is, a representative of the lending institution and a representative of the borrower compute how much money is owed, and to which party, and the lending institution prepares an authority to cancel the deed of trust. Upon payment, the authority to cancel would be given to the borrower and the transaction would thus be concluded in one step.

II

This case should be reviewed by this Court on certiorari because the decision of the Court of Appeals for the Fifth Circuit regarding rescission deprives the petitioner of the valuable property right (the deed of trust on the property in question) without assuring that the borrower will make complete and full restitution to the petitioner. The decision of the appeals court further prohibits the petitioner from charging any interest for the period of time during which the borrower had use of the money. This is an unjust decision which

can and should be remedied by the intervention of this Court.

III

This case merits review by this Court on certiorari because this Court only can settle the question of whether or not a corporation funded under the Legal Services Corporation Act should receive an award of attorney's fees when representing a qualified recipient of services in a truth-in-lending action for which statutory attorney's fees are provided. The granting of attorney's fees to a Legal Services Corporation in these cases is in direct contravention of 42 U.S.C. 2996f(b)(1) which prohibits a program funded under the Legal Services Corporation Act from rendering legal assistance in respect to any fee-generating case. Truth-in-lending cases are inherently fee-generating due to the fact that they provide for the award of attorney's fees.

ARGUMENT

I

Section 1635 of 15 U.S.C. provides in pertinent part:

> "(a) Except as otherwise provided in this section, in the case of any consumer credit transaction in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this section and all other material disclosures required under this part, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. ...
>
> "(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the

obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it."

What the decisions in Sosa v Fite, 498 F.2d 144 (5th Cir. 1974) and Gerasta v. Hibernia National Bank, 575 F.2d 580 (5th Cir. 1978) do not clearly delineate is the duty of the borrower "Upon the performance of the creditor's obligations under this section ... the obligor shall tender the property to the creditor ..." The panel in both Sosa and Gerasta apparently envisioned a sequential situation in which one step would be followed in time by another. While this sequential situation might be proper when dealing with property, it is not proper when dealing with money because in many

situations the borrower will not be able to return the money, a fact of which the lending institution could be well aware and still be required to cancel the deed of trust and security interest. (Tower contends, of course, that §1635 was never intended to apply to loan transactions.) As a matter of fact, in the instant case, Bessie Lee Harris quite frankly stated that when she rescinded the transaction she did not have the money necessary to pay Tower and would not have been able to do so had Tower immediately performed the sequential steps envisioned in Sosa and Gerasta. Even with the offset concept fashioned by the panel in the instant cause, the remedy is not complete, particularly in a situation where the borrower has spent the money, given notice of rescission and has no intention or means of repaying the loan. In such a situation the lending institution is clearly being deprived of property without due process of law under the Fifth Amendment to the United States Constitution. This Court should review Harris and adopt as the rule in rescission cases in which a lending institution lends a borrower money and takes a deed of trust on the borrower's residence, that restitution must be made and that interest at the legal rate must be paid on the money during the period of time the borrower had the use of the lending institution's money. Tower suggests that the ideal manner to handle such a transaction would be similar to a loan closing situation; that is, a representative of the lending institution and a representative of the borrower, or the borrower himself, would compute how much money is owed and to which party, and the lending institution

would prepare an authority to cancel the deed of trust. Upon payment, the authority to cancel would be given to the borrower and the transaction thus concluded in one step. No inequities would result to either party if such a rule were adopted, as the parties to the transaction would be simply placed in the status quo ante.

Such a rule has been adopted in other jurisdictions. In Powers v. Sims and Levin, 542 F.2d 1216 (4th Cir. 1976), the district court held that the plaintiffs did validly rescind the transaction since the defendant had violated the Truth in Lending Act. However, the district court did not condition rescission on full restitution. On appeal, the Court of Appeals for the Fourth Circuit stated that:

> "The district court, and we, exercising traditional equity powers, may condition the borrowers' continuing right of rescission upon their tender to the lender of all of the funds spent by the lender in discharging the earlier indebtedness of the borrowers as well as the value of the home improvements.
>
> "This is not to excuse the lender from the penalties for violation of the Act. ... What we do hold is that when rescission is attempted under circumstances which would deprive the lender of its legal due, the attempted rescission will not be judicially enforced unless it is so conditioned that the lender will be assured of receiving its legal due."

The rule fashioned by the Fourth Circuit in Powers is necessary to assure that equity is done. The Ninth Circuit has recognized this problem in LaGrone v. Johnson, 534 F.2d 1360 (9th Cir. 1976). This case presents a situation similar to the Powers case above. The district court held that the defendant had violated the Truth in Lending Act, but the court did not condition rescission on full restitution. In reversing the district court, the Court of Appeals for the Ninth Circuit held that:

> "The district court erred in not conditioning rescission on the tender of the net amount advanced by the Johnson. The discretion of the court to impose this condition is settled. (Citations omitted) ...
>
> "Mrs. LaGrone should not be permitted to attain a preferred position with respect to rescission by waiting until the statute of limitations has run on the civil penalty. More important, it would be arbitrary to apply equitable principles to ameliorate unduly harsh penalties only if damages are sought. In this case, the violations of the act were egregrious and the equities heavily favor the creditors. Rescission therefore, should have been conditioned on a tender by Mrs. LaGrone of the $11,008.17 advance by the

Johnsons." See also Palmer v. Wilson, 502 F.2d 860 (9th Cir. 1974).

There is an obvious conflict between the Fifth Circuit on one hand and the Ninth and Fourth Circuits on the other in regard to conditioning rescission upon full restitution by the borrower. The application of equitable principles as done by the Court of Appeals for the Fourth and Ninth Circuits is the better rule, and should be adopted by this Court to prevent unjust enrichment to the borrowers in rescission actions under the Truth in Lending Act.

II

The district court's application of §1635 of 15 U.S.C. (and the affirmation of that application by the Court of Appeals for the Fifth Circuit) constitutes a denial of due process to Tower. The Fifth Amendment to the United States Constitution prohibits Congress from denying due process in any legislation enacted by it, stating: "No person shall be ... deprived of life, liberty or property without due process of law ..." In Wolfe v. Colorado, 338 U.S. 25 (1948), the United States Supreme Court stated:

> "Due process of law conveys neither formal nor fixed, nor narrow requirements; it is the compendious expression for all of those rights which the courts must enforce because they are basic to our free society."

Tower clearly was deprived of property without due process. Harris

alleged that Tower failed to make all material disclosures required under 15 U.S.C. §1635(a) and that because of this her right to rescind remained in effect until April 22, 1977 when she sought to exercise it.

Title 15 U.S.C. §1635(b) provides, however, that one who exercises a right to rescind under subsection (a) is not liable for any finance charge, and "any security interest given by the obligor becomes void upon such a rescission". A series of events is contemplated by the statute, as follows: (1) the creditor is to return to the obligor any money or property given as earnest money, downpayment, "or otherwise" within ten days after receipt of a rescission notice; (2) the creditor is to take any necessary action to terminate the security interest created under the transaction; (3) the obligor (Bessie Lee Harris) can retain possession of "any property" that has been delivered; (4) the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its "reasonable value"; and (5) "If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it."

No action by Tower would have prevented Tower's being deprived of property without due process. By its application of 15 U.S.C. §1635, the district court and the Court of Appeals for the Fifth Circuit have created a

situation wherein a lender can be divested of property without due process of law ten days after a letter of rescission is mailed.

Congress did not intend for 15 U.S.C. §1635 to apply to a transaction where payments have been made on a promissory note to repay a loan over a period of time; the term "or otherwise" (15 U.S.C. §1635, "earnest money, down payment, or otherwise") does not refer to such payments and this Court should so hold. Further, the obvious Congressional intent was a rescission within a few days of the transaction, in which case the orderly progression of 15 U.S.C. §1635 would be proper even in a loan transaction. Such a remedy is not proper in the case before the Court. The courts have struggled to fit a loan transaction on which payments have been made over a period of time within the language of 15 U.S.C. §1635 and the "material violation" requirements with little success. In any application of this statute to a factual situation before the Court, the results will be the same: the creditor will be deprived of property.

Clearly, Title 15 U.S.C §1635 is a confusing statute and impossible of compliance without causing a deprivation of the rights of due process.

In Connally v. General Construction Co., 269 U.S. 126, 70 L.Ed 322 (1926), the United State Supreme Court stated:

> "... a statute which either forbids or requires the doing of an

act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

See also United States v. Southern Railway Co., 364 F.2d 86, cert. den., 386 U.S. 1031.

Title 15 U.S.C. §1635 creates an artificial liability which can be obtained against the creditor in every case, without any corresponding benefit to the consuming public. This situation is clearly contrary to logic and reasonableness and violative of the due process clause of the United States Constitution.

III

The plaintiff, represented by an attorney from a Legal Services Corporation organization which is funded by the Legal Services Corporation, is not entitled to a grant of attorney's fees. The Legal Services Corporation is created under Title 42 U.S.C. §2996. The purpose of this corporation is to provide financial support for legal assistance in non-criminal proceedings and in matters to persons financially unable to afford legal assistance. The Legal Services Corporation statute prohibits legal assistance in respect of any fee-generating case [42 U.S.C. §2996(F)(b)(1)]. Truth-in-lending cases are inherently fee generating, due to the fact that they provide for the award of attorney's fees.

The three-judge panel cites Sellers v. Woolman, 510 F.2d 119 (5th

Cir. 1975) as dispositive authority for the proposition that representation by an attorney from a legal services organization does not prohibit an award of attorney's fees. However, Sellers did not deal with an organization funded under the Legal Services Corporation Act which prohibits the acceptance of fee-generating cases. "The purpose behind granting attorney's fees [under the Truth in Lending Act] is to make a litigant whole and to facilitate private enforcement of the Truth in Lending Act." Hannon v. Security National Bank, 537 F.2d 327, 328 (5th Cir. 1976). The granting of attorney's fees in this case will serve only to penalize the creditor, not make the litigant whole. In Burford v. American Finance Co., 333 F.Supp 1243 (N.D.Ga. 1971), the Court did not grant attorney's fees because the plaintiffs had been represented by the Atlanta Legal Aid Society "which is not permitted to accept an award of attorney's fees." In Engel v. Shapert Construction Co., 433 F.Supp 1389 (M.D.Pa. 1978) the plaintiff-consumers were represented by Central Susquehanna Valley Legal Services, a non-profit corporation which receives its operating funds from the Legal Services Corporation. The Court held that:

> "The Engels were represented in this action by Central Susquehanna Valley Legal Services, and thus have incurred no attorney's fees. To award attorney's fees in this case would not serve to make the plaintiffs whole for the expenses incurred in enforcing the Act, but only to further penalize Shapert for the acts of his now departed agent." Engel at 433 F.Supp 1389.

The Missouri Supreme Court has dealt with the question of attorney's fees in truth-in-lending cases where the plaintiff is represented by an attorney for a Legal Services Corporation funded organization in Ehlert v. Ward, 588 S.W.2d 500 (Mo. 1979). In Ehlert, the court cited Hannon v. Security National Bank, 537 F.2d 327 (9th Cir. 1976), for the proposition that "the purpose behind granting attorney's fees is to make a litigant whole and to facilitate private enforcement of the Act. The Missouri Supreme Court reasoned that:

> "Because appellant has not paid or become obligated to pay attorney's fees to the Legal Aid of Western Missouri, an award of attorney's fees to her is not required to make her whole. An award to her would impose a penalty on respondent so that she might receive an unjust enrichment. Amicus suggests that attorney's fees be awarded to appellant's attorneys; not to appellant. This would, of course, eliminate unjust enrichment of appellant. However, the statute (15 U.S.C. §1640(a)(3)) provides that the potential liability of the creditor for attorney's fees is to the debtor; not to the debtor's attorney. Moreover, the attorneys are not party to this suit; they sought no relief other than for their client, and a judgment in their favor for fees would be beyond the scope of the pleadings and void."

There is clearly a conflict in jurisdictions as to the granting of attorney's fees in truth-in-lending cases where the plaintiff is represented by an attorney from a Legal Services Corporation funded organization. The Act clearly contemplates an award of attorney's fees to make the litigant whole. Where the litigant has not incurred attorney's fees no award is required to reimburse him. The award of attorney's fees in cases similar to the instant case serve no purpose except to punish the creditor, an act which is accomplished by the civil penalty which is provided for in the Truth in Lending Act.

The judgment of the Court of Appeals for the Fifth Circuit should be reversed.

CONCLUSION

This Court should review this case because of the conflict among the courts of appeal concerning conditioning rescission upon full restitution. The attorney's fees question presented in this case is one of great importance which must be settled by this Court to ensure uniformity in application of the Truth in Lending Act. For these reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

TOWER LOAN OF
MISSISSIPPI, INC.

By: Pat H. Scanlon
Pat H. Scanlon

APPENDIX A

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

GILBERT F. GANUCHEAU
Clerk

Office of the Clerk
February 20, 1980

Tel 504-589-6514
600 Camp Street
New Orleans, LA 70130

TO ALL PARTIES LISTED BELOW:

NO. 77-3280 BESSIE LEE HARRIS -VS-
TOWER LOAN OF MISSISSIPPI,
INC. (W77-0027(N))

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By: Peggy O. Keller
Deputy Clerk

cc: Mr. Robert R. Marshall
Mr. Pat H. Scanlon
Mr. Barry Powell

Bessie Lee HARRIS, Plaintiff-Appellee,

v.

TOWER LOAN OF MISSISSIPPI, INC., Defendant-Appellant.

No. 77-3280.

United States Court of Appeals, Fifth Circuit.

Jan. 2, 1980.

Borrower brought action alleging violation of Truth in Lending Act in a loan transaction. The United States District Court for the Southern District of Mississippi, Walter L. Nixon, Jr., J., rendered summary judgment for borrower, and lender appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) since premium for dwelling insurance was not included in the finance charge, such charge was understated and borrower properly exercised right to rescind; (2) on rescission, a creditor may offset the value owed to it by the obligor from the sums initially tendered to the obligor; (3) fact that borrower was represented by a legal services attorney and was not obligated to pay the attorney did not bar award of attorney fees; (4) any failure to comply with regulations governing acceptance of fee-generating cases did not warrant resistance to fee award; and (5) fee award was to be paid directly to legal services.

Modified and remanded.

1. Consumer Credit ⇐55

Premium for dwelling insurance should have been disclosed as part of finance charge unless debtor was furnished a written statement which clearly, conspicuously and specifically set forth the cost of the insurance and her option of choosing the insurer; disclosure of property insurance under heading of "Authorized Disbursements" was insufficient and, hence, finance charges were understated. Truth in Lending Act, §§ 106(c), 125(a), 129(a)(4), 15 U.S. C.A. §§ 1605(c), 1635(a), 1639(a)(4); Truth in Lending Regulations, Regulation Z, §§ 226.4(a)(6), 226.8(a), 15 U.S. C.A. following section 1700.

2. Consumer Credit ⇐55

Even if combined disclosures on disclosure statement, check for premium for dwelling insurance and upon the policy itself were sufficient to meet standard for disclosing premium as part of finance charge, they were not made on the same side of a single page and, hence, finance charge was still understated. Truth in Lending Act, §§ 106(c), 125(a), 129(a)(4), 15 U.S.C.A. §§ 1605(c), 1635(a), 1639(a)(4); Truth in Lending Regulations, Regulation Z, §§ 226.5(a)(6), 226.-8(a), 15 U.S.C.A. following section 1700.

3. Consumer Credit ⇐60

Since finance charge was understated because of failure to disclose premium for dwelling insurance the debtor was not given an accurate disclosure of amount of finance charge and properly exercised her right to rescind. Truth in Lending Act, §§ 125(b), 129(a)(4), 15 U.S. C.A. §§ 1635(a), 1639(a)(4).

4. Consumer Credit ⇐60

Once a creditor has completed his obligations under a rescinded transaction, it is incumbent on the obligor to return any value received from the creditor. Truth in Lending Act, § 125(b), 15 U.S.C.A. § 1635(b).

Synopses, Syllabi and Key Number Classification
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5. Consumer Credit ⇐60

Where a transaction is rescinded under Truth in Lending Act, the creditor is not barred from offsetting the value owed to it by the obligor from the sum it initially tendered to the obligor. Truth in Lending Act, § 125(b), 15 U.S.C.A. § 1635(b).

6. Consumer Credit ⇐60

Where a transaction is rescinded on the Truth in Lending Act, the creditor loses any rights in the property unaccepted ten days after tender by the obligor. Truth in Lending Act, § 125(b), 15 U.S.C.A. § 1635(b).

7. Consumer Credit ⇐67

Award of attorney fees on rescission of loan transaction for violation of Truth in Lending Act was not barred merely because debtor was represented by a legal services attorney and was not obligated to pay the attorney. Legal Services Corporation Act, § 1001 et seq., 42 U.S.C.A. § 2996 et seq.; Truth in Lending Act, § 125(b), 15 U.S.C.A. § 1635(b).

8. Consumer Credit ⇐67

Although record was barren of any indication of whether regulations for accepting a fee-generating case under Legal Services Corporation Act were met, such requirements were properly satisfied, for purpose of awarding attorney fee in action under Truth in Lending Act, because damages sought were ancillary to the principal object of rescission. Legal Services Corporation Act, § 1001 et seq., 42 U.S.C.A. § 2996 et seq.; Truth in Lending Act, § 125(b), 15 U.S.C.A. § 1635(b).

9. Consumer Credit ⇐67

Even if there was a failure to comply with regulations governing acceptance of fee-generating cases under Legal Services Corporation Act, proper recourse would be to complain to legal services, the state advisory council, or the Corporation and not resistance to fee award, as rendered in Truth in Lending Act case. Legal Services Corporation Act, § 1007, 42 U.S.C.A. § 1007; 42 U.S.C.A. § 1988; Truth in Lending Act, § 125(b), 15 U.S.C.A. § 1635(b).

10. Consumer Credit ⇐67

Where successful borrower in Truth in Lending Act suit to rescind loan transaction was represented by legal services attorney, attorney fee award was to be paid directly to legal services. Legal Services Corporation Act, § 1001 et seq., 42 U.S.C.A. § 2996 et seq.; Truth in Lending Act, § 125(b), 15 U.S.C.A. § 1635(b).

11. Consumer Credit ⇐61, 67

Where borrowing transaction was rescinded under Truth in Lending Act because finance charge was understated, the district court properly cancelled deed of trust securing the loan and awarded $1,000 statutory penalty. Truth in Lending Act, §§ 125(b), 129(a)(4), 15 U.S.C.A. §§ 1635(a), 1639(a)(4).

Appeal from the United States District Court of the Southern District of Mississippi.

Before WISDOM, TJOFLAT and REAVLEY, Circuit Judges.

REAVLEY, Circuit Judge:

Appellee, Bessie Harris, filed this suit in the district court alleging a violation of the Truth-in-Lending Act in a loan

transaction. The lower court granted Harris' motion for summary judgment. The judgment cancelled the note and a deed of trust securing the obligation, ordered that appellant, Tower Loan of Mississippi, Inc. ("Tower Loan"), return $1182.00 which Harris had previously paid on the note, allowed Harris to retain the loan proceeds in her possession, and awarded her a $1000 statutory penalty and $300 attorney's fees. On this appeal, Tower Loan argues that it made all material disclosures required. Alternatively, it argues that Harris is not entitled to a cancellation of the note; rescission, if allowed, should be conditioned on restitution; and that Harris is not entitled to an award of attorney's fees. We remand the cause for determination and offset of the amount which Tower Loan owes to Harris.

Tower Loan advanced $1056.34 to Harris for which she agreed to repay $2125.00 over two years. The loan was secured by a deed of trust on her home, household furniture, and an automobile. The $1056.34 figure was arrived at by deducting various fees, including the finance charge, insurance, and a recording fee, from the scheduled total of payments of $2125.00.

One fee was for fire insurance on Harris' dwelling, which was written through Tower Loan. A check for $67.96 was written in favor of Harris and Jack Lee for the premium on the policy. Jack Lee is president of Tower Loan, which was the sole beneficiary under the terms of the policy. The only disclosure of the deduction and its purpose on the disclosure statement is under "Authorized Disbursements." The entry reads "Bessie Harris—Jack Lee $67.96." The check disbursing this portion of the loan proceeds indicated that it was for dwelling insurance. The insurance policy showed on its face that the prepaid premium was $67.96.

Harris subsequently had difficulty meeting the payment terms of the loan. She enlisted the aid of Central Mississippi Legal Services ("Legal Services"), a legal services program funded by the Legal Services Corporation ("Corporation"), to negotiate more favorable repayment terms. When negotiations proved unfruitful, Harris gave notice of rescission and later filed this suit. The trial judge granted Harris' motion for summary judgment because he found a material nondisclosure which caused the finance charge to be understated.

A. *Failure to Disclose*

[1, 2] The premium for dwelling insurance was not included in the finance charge. It should have been disclosed as part of the finance charge unless Harris was furnished a written statement which clearly, conspicuously, and specifically set forth the cost of the insurance, and her option of choosing the insurer. 15 U.S.C. § 1605(c) (1976); 12 C.F.R. § 226.4(a)(6). The disclosure of the property insurance under "Authorized Disbursements" is insufficient to meet this standard. Thus, the finance charge was understated. *See Woods v. Beneficial Finance Co. of Eugene*, 395 F.Supp. 9, 13 (D.Ore.1975). Even if the combined disclosures on the disclosure statement, the check, and the insurance policy were sufficient to meet this standard, they were not made on the same side of a single page. 12 C.F.R. § 226.8(a); *Edmondson v. Allen-Russell Ford, Inc.*, 577 F.2d 291, 295 note 9 (5th Cir. 1978).

B. *Rescission and its Mechanics*

[3] Since the finance charge was understated, Harris was not given an accu-

rate disclosure of the amount of the finance charge as required by 15 U.S.C. § 1639(a)(4) (1976). Pursuant to 15 U.S.C. § 1635(a) (1976) she properly exercised her right to rescind the transaction.

[4] Section 1635(b)[1] of Title 15 controls the mechanics of rescission. It requires the creditor to return all funds or property advanced by the borrower within 10 days of receiving notice of rescission. The creditor is also required to take any action necessary to reflect the termination of any security interest created under the transaction. A failure to perform these duties within the 10 day period may result in the creditor incurring statutory damages under 15 U.S.C. § 1640(a) (1976) in addition to the rescission remedy. *Gerasta v. Hibernia Nat'l Bank*, 575 F.2d 580, 583–84 (5th Cir. 1978). Once the creditor has completed his obligations, it is incumbent upon the obligor to return any value received from the creditor.

[5] Nothing in section 1635(b) prevents the creditor from offsetting the value owed to it by the obligor from the sum it initially tenders to the obligor. Such an arrangement prevents a perfunctory exchange of funds and protects the lender from a dissipation of the money while it is in the hands of the obligor. We believe this to be an acceptable course because it is the only means to insure the accomplishment of the congressional purpose of restoring the parties to the status quo ante while affording the statutory remedies to the obligor.

[6] We recognize that the statutory language and language from *Sosa v. Fite*, 498 F.2d 114 (5th Cir. 1974) and *Gerasta*, 575 F.2d at 584, can be read as envisaging performance of obligations by the creditor followed in time by tender of the loan proceeds by the obligor. *Gerasta* also foreclosed an argument that the creditor's duties are *conditioned* upon tender by the obligor. *Id.* at 585. Nevertheless, this procedure for offsetting does not conflict with the spirit of those decisions. It will accelerate complete rescission while protecting creditors in appropriate cases. Our approval of offsetting does not conflict with *Gerasta*'s disapproval of conditional rescission in that we do not permit a creditor to refuse to perform unless or until the obligor tenders payment. The creditor must perform but is permitted to minimize losses from those borrowers who would eventually fail to tender the loan proceeds. We reaffirm the statutory language and the holding in *Sosa* that

1. 15 U.S.C. § 1635(b) (1976) reads:

(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it.

the creditor loses any rights in property unaccepted ten days after tender by the obligor.

C. *Attorney's Fees*

[7] Tower Loan claims that an award of attorney's fees was improper because Harris was represented by a legal services attorney and was not obligated to pay the attorney. *Sellers v. Wollman*, 510 F.2d 119, 123 (5th Cir. 1975), forecloses this argument. Tower Loan seeks to distinguish *Sellers* by arguing that the legal aid society in *Sellers* was not prohibited by federal law from accepting a fee generating case. Nothing in *Sellers* conditions an award upon compliance with statutory and regulatory provisions for the acceptance of cases by the legal services provider, and the argument is particularly unpersuasive in the present case.

[8] The record is barren of any indication of whether the regulations for accepting a fee generating case under the Legal Services Corporation Act ("Act"), 42 U.S.C. §§ 2996 *et seq.* (1976), were met. However, we note that they were probably satisfied because the damages sought were ancillary to the principal object of rescission. 45 C.F.R. 1609.4(b).

[9] It is also argued that Legal Services was barred from accepting this case because the Act prohibits the use of Corporation funds to finance fee generating litigation. This appraisal of the statutory language is erroneous providing Legal Services complied with the regulations for accepting a fee generating case. 42 U.S.C. § 2996f(b)(1) (1976). Even if there was a failure to comply with the regulations, the proper recourse would be to complain to Legal Services, the State Advisory Council, or the Corporation; not resistance to a fee award. 45 C.F.R. 1618.3. This procedure is designed to prevent a question of whether the Act has been violated from becoming an ancillary issue in any case undertaken by a legal services organization receiving funds under the Act. 45 C.F.R. 1618.1.

[10] While the lower court opinion was unclear as to whether the attorney's fees should be paid to Harris or directly to Legal Services, 45 C.F.R. 1609.5(b) requires that any fee be remitted promptly to Legal Services. The judgment should provide that Tower Loan is to pay this sum directly to Legal Services. *Cf. Miller v. Carson*, 563 F.2d 741, 756 (5th Cir. 1977) (award of attorney's fees directly to counsel under 42 U.S.C § 1988 (1976)).

D. *Judgment*

[11] We conclude that a violation of the Consumer Credit Protection Act occurred. The district court properly cancelled the deed of trust and awarded a $1000 statutory penalty. The judgment of the district court should be modified in two respects. First, the $2182 owed by Tower Loan to Harris (consisting of $1182 previously paid on the note and the $1000 statutory penalty) should be reduced by the amount Harris owes to Tower Loan under 15 U.S.C. § 1635(b) (1976). Since the note is unclear as to which deductions from the total of payments constitute money paid for the benefit of Harris and which were charges by Tower Loan, the case must be remanded to the district court for such a determination. Harris is not liable to Tower Loan for any finance or other charge. Second, the $300 attorney's fees should be paid directly to Legal Ser es.

MODIFIED AND REMANDED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

BESSIE LEE HARRIS — PLAINTIFF

VS. — CIVIL ACTION NO. W77-0027(N)

TOWER LOAN OF MISSISSIPPI, INC. — DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on to be heard on cross-motions for summary judgment and the Court makes the following findings of fact and conclusions of law:

1. This action involves a consumer credit transaction on or about 23 April 1976 between the plaintiff, Bessie Lee Harris, as debtor, and the defendant, Tower Loan of Mississippi, Inc., a Mississippi corporation, as creditor, and the transaction is subject to the disclosure requirements of the Truth-in-lending provisions of the Consumer Credit Protection Act, 15 U.S.C. §§1601 et seq., and Regulation Z, 12 C.F.R. 226, promulgated pursuant to said Act.

2. During the course of this transaction, the defendant violated the provisions of the Truth-in-Lending Act

and Regulation Z by failing to provide a clear and specific statement in writing of the cost of credit property insurance written in connection with this transaction, instead disclosing only "Bessie Harris - Jack Lee $67.96", and not including such insurance cost in the finance charge. 15 U.S.C. §1605(c); 12 C.F.R. §226.4(a)(6).

3. The aforesaid disclosure violation and noncompliance with the Truth-in-Lending Act and Regulation Z is a "material" nondisclosure as set forth in 15 U.S.C. §1635(a) and 12 C.F.R. §226.9(a).

4. In connection with this transaction, the defendant acquired a security interest in the form of a deed of trust on the real property used as the principal residence of the plaintiff. Plaintiff has duly and timely given notice of rescission of this transaction to the defendant pursuant to 12 C.F.R. §226.9.

5. After plaintiff's timely rescission, the law requires that within ten days the creditor shall return to the obligor any money given as earnest money, down payment, or otherwise, and that the creditor take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. Then and only then is the debtor required to return the amount borrowed to creditor. Upon the creditor's failure to comply with these requirements, the debtor is not required to do anything else and is not required to return any money received from the creditor. The creditor having failed to comply with the Act and Regulation Z, the creditor cannot

complain about the penalty set forth by the Act. 15 U.S.C. §1635(b); 12 C.F.R. §226.10(d); Sosa v. Fite, 498 F.2d 114 (5th Cir. 1974).

6. Defendant did not within ten days after receipt of plaintiff's notice of rescission return to the plaintiff the money theretofore paid by the plaintiff to defendant in connection with this transaction nor did defendant take any action necessary or appropriate to terminate or reflect the termination of the deed of trust on plaintiff's dwelling created under this transaction. As a result, plaintiff is under no obligation to tender the remaining amount of the amount financed or the cash received by her from defendant in connection with this transaction. Ibid.

7. Plaintiff is therefore entitled to rescind this transaction; to retain all money in her possession she has received from Tower; to a judgment against defendant in the amount of $1182 for all money she has heretofore paid defendant; to cancellation of the note executed by her to defendant; and to cancellation of the deed of trust executed by her in favor of defendant on 23 April 1976 recorded in Book 545 at page 313 in the office of The Chancery Clerk of Warren County, Mississippi.

8. In addition, the law is plain and clear that plaintiff is also entitled to a statutory penalty under 15 U.S.C. §1640(a) in the amount of $1,000 (since double the amount of the finance charge is greater than the amount of $1,000). Sellers v. Wollman, 510 F.2d 119 (5th Cir. 1975).

9. Although plaintiff is represented by an attorney employed by a legal services program funded pursuant to the Legal Services Corporation Act, 42 U.S.C. §2996, plaintiff is entitled to a reasonable attorney's fee in this action and the Court finds that a reasonable attorney's fee is $300. Sellers v. Wollman, supra.

10. There are no genuine issues of any material facts in this action.

11. Defendant's cross-motion for summary judgment is without merit and is denied as a matter of law.

12. Plaintiff is entitled to summary judgment against the defendant as a matter of law as set forth above.

ORDERED AND ADJUDGED, this 19th day of September, 1977.

Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Barry H. Powell
Attorney for Plaintiff

Robert R. Marshall
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

BESSIE LEE HARRIS	PLAINTIFF
VS.	CIVIL ACTION NO. W77-0027(N)
TOWER LOAN OF MISSISSIPPI, INC.	DEFENDANT

FINAL JUDGMENT

This cause coming on to be heard on cross-motions for summary judgment, and the Court finding that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law, and the Court having heretofore separately entered its findings of facts and conclusions of law, it is therefore,

ORDERED AND ADJUDGED that:

1. Plaintiff, Bessie Lee Harris, be and hereby is awarded a judgment against the defendant, Tower Loan of Mississippi, Inc., a Mississippi corporation, in the amount of $1000 statutory Truth-in-Lending penalty, $1182 for sums heretofore paid defendant, and $300 as a reasonable attorney's fee, for a total of $2482.00

2. The note executed by Bessie Lee Harris to Tower Loan of Mississippi, Inc., d/b/a Russell Baker Finance of Vicksburg, loan number 2379, dated 4/23/76, with

total of payments $2125, is hereby cancelled.

3. The deed of trust executed by Bessie Lee Johnson Harris in favor of Tower Loan of Mississippi, Inc., beneficiary, Jack R. Lee, trustee, dated April 23, 1976, and recorded in book 545 at page 313 in the office of the Chancery Clerk of Warren County, Mississippi, is hereby declared null and void and hereby cancelled, and the defendant is hereby ordered to cancel said deed of trust on the records of said Chancery Clerk.

4. Costs of this cause are assessed to the defendant.

ORDERED AND ADJUDGED, this 19th day of September, 1977.

Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Barry H. Powell
ATTORNEY FOR PLAINTIFF

Robert R. Marshall
ATTORNEY FOR DEFENDANT

APPENDIX B

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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15 U.S.C. § 1635

Right of rescission as to certain transactions - Disclosure of obligor's right to rescind

Return of money or property following rescission

(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of

law, becomes void upon such a rescission. Within ten days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it.

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15 U.S.C. § 1640

Civil liability -Individual or class action for damages; amount of award; factors determining amount of award

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of --

(1) Any actual damage sustained by such person as a result of the failure;

(2) (A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creidtor; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

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42 U.S.C. § 2296
Legal Services Corporation

§ 2996f(b) No funds made available by the Corporation under this subchapter, either by grant or contract, may be used --

(1) to provide legal assistance (except in accordance with guide lines promulgated by the Corporation)

with respect to any fee-generating case (which guidelines shall not preclude the provision of legal assistance in cases in which a client seeks only statutory benefits and appropriate private representation is not available).

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12 CFR § 226.9
Truth in Lending Regulations

12 CFR § 226.9. Right to rescind certain transactions

(d) Effect of rescission. When a customer exercises his right to rescind under paragraph (a) of this section, he is not liable for any finance or other charge, and any security interest becomes void upon such a rescission. Within 10 days after receipt of a notice of rescission, the creditor shall return to the customer any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the customer, at the option of the customer. If the

creditor does not take possession of the property within 10 days after the tender by the customer, ownership of the property vests in the customer without obligation on his part to pay for it.

YOUNG, SCANLON AND SESSUMS
1440 Deposit Guaranty Plaza
Jackson, Mississippi 39205

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that all parties required to be served with copies of this petition for writ of certiorari have been served in that on this the 30th day of April, 1980, three copies of the petition were mailed to Barry H. Powell, Esq., Post Office Box 951, Jackson, Mississippi 39205, attorney of record for the respondent.

Pat H. Scanlon

Pat H. Scanlon